

**Report of the Committee convened pursuant to s 40-50 of the *Insolvency Practice Schedule (Bankruptcy)* to make a decision about Ms Louise Thomson, a Registered Trustee**

**Committee members**

- Mr Dipen Mitra, delegate of the Inspector-General in Bankruptcy (Chair)
- Ms Mary Wyburn, the Attorney-General's appointee;
- Mr Jason Porter, a registered trustee chosen by ARITA

**Decision**

The Committee has decided pursuant to s 40-55(1) of the *Insolvency Practice Schedule (Bankruptcy)* (the **Schedule**) which is at Schedule 2 to the *Bankruptcy Act* 1966 (the **Act**) that:

1. Ms Thomson's registration should be cancelled; and
2. The Inspector-General in Bankruptcy should publish specified information in relation to the Committee's decision, namely, a copy of the Committee's decision with pseudonyms substituted for the names of people and entities other than Ms Thomson.

**Introduction**

1. This is the decision of the Committee convened by the Inspector-General in Bankruptcy (the **Inspector-General**) pursuant to s 40-50 of the Schedule to make a decision under s 40-55 of the Schedule in relation to Ms Louise Thomson, a registered trustee (**Ms Thomson**).
2. The Committee was convened on 28 November 2019 by the Inspector-General. Under s 50-90 of the *Insolvency Practice Rules (Bankruptcy)* 2016 (the **Rules**), the Committee must use its best endeavours to decide the matter within 60 days after the matter is referred to it. Regrettably, in this case, 60 days from the date of referral has expired. The series of events contributing to this time frame is set out below at paragraphs 20-23.

**Background**

3. Ms Thomson is an experienced trustee in bankruptcy. She was registered as a trustee on 27 October 2009, having been previously employed as an insolvency practitioner, and by the Insolvency and Trustee Service Australia, as the Australian Financial Security Authority (**AFSA**) was previously known.
4. The facts and circumstances leading to the formation of the Committee are contained in the documents provided to the Committee by the Delegate, comprising 694 pages (the **Materials**), including the explanation provided by Ms Thomson, through her legal representatives, to the Delegate on 21 October 2019 (the **Response**).

5. According to the Materials, Ms Thomson provided her consent to act as the trustee of the bankrupt estate of Mr M (a pseudonym) in circumstances where Mr M had, in his capacity as a “financial consultant” and director of a company called the Company (a pseudonym)<sup>1</sup>, referred three administrations to her during the previous 10 months.<sup>2</sup> Accordingly, the Committee has found that, as at 28 October 2013, Ms Thomson and Mr M had a referral relationship.
6. Mr M filed a debtor’s petition on 29 October 2013 naming Ms Thomson as his trustee in bankruptcy.<sup>3</sup>
7. On 30 October 2013<sup>4</sup> and 26 November 2013<sup>5</sup> Ms Thomson prepared documents entitled “Declaration of Trustee’s Independence” in relation to Mr M’s bankrupt estate. In neither of these declarations did she disclose that Mr M had referred three administrations to her between January and August 2013.
8. During the period of Mr M’s bankruptcy, the Materials indicate that he continued to participate in the administration of the estate of Mr F (a pseudonym)<sup>6</sup> in his capacity as a representative of the Company, and, on 11 December 2013, he voted on its behalf to approve Ms Thomson’s remuneration in that bankruptcy.<sup>7</sup>
9. The Materials also indicate that, during the period of Mr M’s bankruptcy, Ms Thomson became the trustee of two further bankrupt estates in circumstances where Mr M was involved:<sup>8</sup> for example, in two emails sent by Mr M to Ms Thomson 13 and 16 January 2014 Mr M described the matter of Mr B (a pseudonym) as “the new referral.”<sup>9</sup>
10. Further email communications between Mr M and Ms Thomson sent between 7 January 2016 and 28 October 2016 disclose Mr M communicated with Ms Thomson during this period in his capacity as a representative of the Company<sup>10</sup> regarding the administrations of Mr B and Mr MM (a pseudonym).<sup>11</sup> For example, Mr M wrote, on 28 October 2016, “I’ve gone through Mr B’s numbers again and spoke to him about what is achievable and, if your co-directors agree, I’d like to

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<sup>1</sup> Mr M was a director and secretary of the Company between 17 June 2005 and 29 October 2013 (*Materials*, p 100)

<sup>2</sup> The bankrupt estates of Mrs C and Mr C (pseudonyms), and Mr F (*Materials*, pp 19, 48, 610-9)

<sup>3</sup> Internal emails recorded that Ms Thomson referred the estate of Mr M (*Materials*, pp 80-5)

<sup>4</sup> *Materials*, pp 86-8

<sup>5</sup> *Materials*, pp 117-23

<sup>6</sup> *Materials*, p 149

<sup>7</sup> *Materials*, p 152

<sup>8</sup> The bankrupt estates of Mr B and Mr MM

<sup>9</sup> *Materials*, pp 163-5

<sup>10</sup> The signature block on these emails referred to the Company at its street address and provided contact details for Mr M at the Company. (*Materials*, pp 216-8, 220-1)

<sup>11</sup> The circumstances of Mr M’s communications with Ms Thomson in connection with the estate of Mr MM was addressed at paragraph 3.3(x) of the Response (*Materials*, p 682)

propose that Mr B will make an offer to his creditors..." Ms Thomson responded: "Let's chat on Monday."<sup>12</sup>

11. Mr M was discharged from bankruptcy on 30 October 2016.
12. On 12 August 2019, the Inspector-General's delegate, Mr Kaura (the **Delegate**), issued a show cause notice (**SCN**) to Ms Thomson under s 40-40 of the Schedule. The SCN contained two grounds:
13. The first ground was that Ms Thomson failed to carry out adequately and properly the duties of a trustee or any duties or functions that a registered trustee is required to carry out under a law of the Commonwealth or of a State or Territory, or under the general law, as set out in s 40-40(1)(l) of the Schedule.
14. Section 19 of the Act includes the following duties, which are relevant to the facts set out in the SCN:
  - 14.1. ss 19(1)(b), determining whether the estate includes property that can be realised to pay a dividend to creditors;
  - 14.2. ss 19(1)(f), taking appropriate steps to recover property for the benefit of the estate; and
  - 14.3. ss 19(1)(g), taking whatever action is practicable to try to ensure that the bankrupt discharges all of the bankrupt's duties under this Act.
15. The first ground also includes trustees' duties arising under the general law. As set out in the SCN, the general law duty that Ms Thomson failed to carry out adequately and properly was the duty to avoid conflicts of interest.
16. The second ground was that Ms Thomson failed to comply with a standard prescribed for the purposes of subsection (4), under ss 40-40(1)(p) of the Schedule. In accordance with s 122 of Schedule 1 to the *Insolvency Law Reform Act 2016*, this is a reference to paragraph 2.3 of the Performance Standard, entitled "Conflicts of Interest", as formerly prescribed by "regulations made for the purpose of ss 155H(5) of the old Act".
17. Paragraph 2.3 of the Performance Standards in force at the relevant time (**Paragraph 2.3**) was set out in the SCN:

*If during an administration, it becomes apparent that the trustee has an actual or potential conflict of interest in relation to the administration, the trustee must, as soon as practicable after becoming aware of the conflict of interest,*

  - a) *Notify the creditors, the person who appointed the trustee, a committee of inspection or the court, as appropriate, of the conflict of interest; and*
  - b) *Take appropriate steps to avoid the conflict of interest.*

*Examples: Conflicts of interest*

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<sup>12</sup> *Materials*, p 220

*1. The appointer or, in the case of a sequestration order, the bankrupt is or was a client of the trustee or the trustee's firm in relation to a financial, trust or insolvency planning matter.*

*2. The trustee or a member of the trustee's firm is a personal friend, relative or business associate of the debtor.*

18. In accordance with ss 40-50(b)(i) of the Schedule, the Delegate sought a response from Ms Thomson to the SCN within 20 business days of the date of the SCN (ie by 9 September 2019). Ms Thomson sought, and was granted, an extension of time to respond to the SCN, and her explanation in response to the SCN was provided on 21 October 2019. The Delegate was not satisfied by this explanation and, on 28 November 2020 referred Ms Thomson to this Committee under ss 40-50(b)(ii) of the Schedule.

#### **Process**

19. The Committee's role is to decide one or more of the matters set out at ss 40-55(1) of the Schedule with respect to Ms Thomson.
20. As part of this process, the Committee interviewed Ms Thomson at AFSA's offices in Sydney on 10 March 2020 (the **Interview**). The Interview was originally scheduled to take place on 30 January 2020, with notice being given to Ms Thomson by letter sent by the Committee chair on 8 January 2020.
21. The Committee chair sent a further communication to Ms Thomson on 21 January 2020, requesting confirmation that she would be attending the Interview, and by email dated 22 January 2020, Ms Thomson requested a delay of 7 days. The Committee chair agreed to reschedule the Interview for 6 February 2020, however, on 30 January 2020, the Committee chair received notice that Ms Thomson had engaged new legal representatives, and sought a further extension of time for the Interview. Ms Thomson's legal representatives also raised a number of logistical concerns about the conduct of the Interview, which the Committee agreed to accommodate.
22. Between 24 February 2020 and 9 March 2020, the Committee chair and Ms Thomson's legal representatives exchanged further correspondence and consensus was reached regarding the conduct of the interview, save for certain exceptions, which are described below at paragraphs 33-39.
23. Therefore, the Committee considers that the Interview on 10 March 2020 was conducted as soon as practicable, in the circumstances.
24. The Interview was transcribed and the transcript was made available to the Committee and Ms Thomson on 30 March 2020.

#### **Notification to Ms Thomson of Committee's conclusions**

25. By letter dated 6 March 2020, Ms Thomson's legal representatives proposed that the Committee notify Ms Thomson of its conclusions as to whether the two grounds in the SCN were made out, and then receive submissions from Ms Thomson as to the contemplated sanction. Support for this approach was said to be found in a

decision of the Administrative Appeals Tribunal.<sup>13</sup> This case noted that under r 50-5 of the Rules, the Committee may determine its own procedures. It is also required, under r 50-55 of the Rules, to observe natural justice.

26. According to the decision of a Committee convened on 7 February 2018 (the **2018 Committee**), dated 5 April 2018, the 2018 Committee undertook to:
  - 26.1. provide the trustee with a report setting out the conclusions it has reached with respect to the four (4) grounds in the SCN with an invitation to make submissions as to what decision or decisions were considered appropriate from those listed in s 40-55; and
  - 26.2. then finalise its report and give it to the trustee and the Inspector-General pursuant to s 40-60.
27. Acting consistently with the process adopted by the 2018 Committee, the Committee provided a draft of this decision to Ms Thomson's legal representatives on 22 June 2020 and they provided submissions in response to the Committee on 8 July 2020.

***Materials before the Committee***

28. The Committee has had regard to the following:
  - 28.1. The Materials;
  - 28.2. The transcript of the interview of Ms Thomson conducted on 1 and 6 March 2018 by the 2018 Committee<sup>14</sup>;
  - 28.3. The Inspector-General Practice Direction 14, entitled *Proper Performance of Duties of a Trustee* issued 30 March 2010, updated 13 February 2013;
  - 28.4. List of cases referred to by the Committee dated 14 February 2020 (attached to this Decision at **Annexure A**);
  - 28.5. Submissions by Ms Thomson dated 24 February 2020 (**24 February Submissions**);
  - 28.6. Submissions by Ms Thomson dated 10 March 2020 (**10 March Submissions**);
  - 28.7. The transcript of the Interview of Ms Thomson conducted by the Committee on 10 March 2020;
  - 28.8. Submissions by Ms Thomson dated 3 April 2020 (**3 April Submissions**); and
  - 28.9. Submissions by Ms Thomson in relation to the draft decision dated 8 July 2020 (**8 July Submissions**).

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<sup>13</sup> *Joubert and Members of the Companies Auditors and Liquidators Disciplinary Board* [2018] AATA 944

<sup>14</sup> Ms Thomson agreed that she had been provided with a copy of this document at the interview on 10 March 2020.

29. At the conclusion of the Interview, Ms Thomson's legal representative reserved Ms Thomson's right to provide further documents to the Committee, and the Committee agreed to receive and consider further documents from Ms Thomson.<sup>15</sup>
30. No further documents were provided by or on behalf of Ms Thomson to the Committee.
31. By email dated 27 March 2020, the Committee chair put Ms Thomson's legal representatives on notice of a matter that was not put to Ms Thomson explicitly at the interview, and invited further written submissions in response.
32. On 3 April 2020, Ms Thomson's legal representatives provided the 3 April Submissions to the Committee chair addressing the contents of the email dated 27 March 2020.

***Contentions by Ms Thomson regarding the relevance of documents provided to the Committee by the Delegate***

33. By her submissions dated 24 February 2020, Ms Thomson contended that certain documents contained in the Materials<sup>16</sup> were not relevant and foreshadowed objection being taken to "any questions or references to matters not referred to in the Notice or to any documents (listed in the submissions)..."
34. In response, the Committee chair sent an email to Ms Thomson's legal representatives on 26 February 2020, confirming that they would have an opportunity to make submissions to the Committee about these matters at the interview, and the Committee would take these into account.
35. The Committee notes that no objection was taken by or on behalf of Ms Thomson to questions asked by the Committee members, or references to documents, at the Interview. The Committee also notes that no submissions were received from Ms Thomson regarding particular documents following the Interview and her legal representative confirmed that it was not suggested that the questions asked by the Committee went outside the scope of the SCN.<sup>17</sup>
36. Among the list of documents in the submissions dated 24 February 2020 was the Third Edition of the Code of Conduct published by the Australian Restructuring Insolvency & Turnaround Association (**ARITA**) on 1 January 2014 (amended on 18 August 2014).
37. Ms Thomson submitted that this version of the Code of Conduct was not applicable at the time of the events alleged in the SCN, and further that, as she was not a member of ARITA, she was not bound by the Code of Conduct in any event.

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<sup>15</sup> Interview, paragraphs 531, 533 (p 48)

<sup>16</sup> No reference was made by Ms Thomson to the Accounting Professional & Ethical Standards Board 330 Insolvency Services revised November 2011, and in force from 1 April 2012 (**APES 330/12**) and the Accounting Professional & Ethical Standards Board 330 Insolvency Services revised September 2014, and in force from 1 January 2015 (**APES 330/15**) in her submission dated 24 February 2020.

<sup>17</sup> Interview, paragraph 533 (p 48)

38. The Committee notes that, under r 50-55(2) of the Rules, the Committee is not bound by any rules of evidence but may inform itself on any matter as it sees fit. This is consistent with the Committee's role as an expert decision-maker responsible for determining the contentions of the Delegate in the SCN and making a decision under s 40-55 of the Schedule.<sup>18</sup>
39. Therefore, while the Committee agrees with the proposition that Ms Thomson was not a member of ARITA at the relevant time (and has not since become one), and that the Committee is neither required, nor authorised, to determine if Ms Thomson's conduct complied with the ARITA Code of Conduct (whether at the relevant time, or otherwise), the Committee does not agree that it is not entitled to take the contents of the ARITA Code of Conduct into account, where relevant.

***Further preliminary considerations by the Committee***

40. The Committee also notes that Ms Thomson referred to the Accounting Professional & Ethical Standards Board 330 Insolvency Services revised November 2011, and in force from 1 April 2012 (**APES 330/12**) and the Accounting Professional & Ethical Standards Board 330 Insolvency Services revised September 2014, and in force from 1 January 2015 (**APES 330/15**), at paragraph 4.4 of the Response.
41. In the email sent by the Committee chair to Ms Thomson's legal representatives on 26 February 2020, reference was made to APES 330/12 and APES 330/15, and it was confirmed that Ms Thomson would have an opportunity to make submissions about these documents at the interview.
42. The Committee notes that no submissions were received from Ms Thomson regarding the relevance of APES 330/12 and APES 330/15 or the use that the Committee could or should make of these documents in its decision-making, despite being invited to do so by the Committee chair, as set out above at paragraph 41.
43. The Committee has applied the following principles, set out by Tamberlin J in his consideration of ss 1292(2)(d)(ii) of the *Corporations Act 2001* (*Dean-Willcocks v CALDB* (2006) 59 ASCR 698, at 709):
- 43.1. The level of performance called for is that of "adequacy". The standard is that the duty must be performed "properly";
- 43.2. The emphasis is on the adequacy level or sufficiency of performance of the function or role;
- 43.3. The provision is designed to enable a board representative of the commercial and accounting communities to consider whether the function has been adequately and properly carried out;
- 43.4. To evaluate the level of performance is a question of fact and degree which calls for the application of a standard; and

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<sup>18</sup> See, generally, *Inspector-General Practice Statement 8* (IGPS 8 – Involuntary Cancellation of Trustee Registration)

- 43.5. It is not a qualitative consideration whether there has been performance, but rather calls for consideration as to the sufficiency of the acts or omissions of the administration.
44. In addition, the Committee has taken into account the decision of Hill J, in relation to the phrase “adequately and properly” in s 1292 of the *Corporations Act 2001*, in *Davies v ASC* (1995) 18 ACSR 129 at 147-9:

*The question of whether duties or functions of an auditor have been carried out or performed ‘adequately’ is obviously a question which involves judgment in a particular case...If the failure to perform a statutory or other duty was such as to be insignificant, de minimis or trivial, it could perhaps be possible to argue that the auditor had not failed to carry out or perform the relevant duty or function adequately.*

### **Summary of Reasons for Decision**

45. The Committee has found that particularised grounds one and two in the SCN are both made out.

### **Findings in Respect of Specific Grounds**

#### ***Particularised Ground One - ss 40-40(1)(l) of the Schedule***

46. According to ground one of the SCN, Ms Thomson failed to carry out adequately and properly the duties of a trustee or any other duties or functions that a registered trustee is required to carry out under a law of the Commonwealth or of a State or Territory, or under the general law.
47. Under the general law, Ms Thomson had a duty to avoid conflicts of interest, and not to allow the situation to arise where she may have been seen to be in that position of conflict or potential conflict (*Re Partridge* [1982] FCA 316). She was required to be, and be seen to be, completely independent (*Re Lamb; Ex parte Registrar in Bankruptcy* (1984) 1 FCR 391). The Committee regards the following principles underlying this duty as relevant to the factual allegations contained in the SCN:
- 47.1. The proper performance of the function of a trustee is sufficiently wide to include the act of accepting the appointment of the office. The obligation to act properly in accepting appointments is one of the duties and obligations of the trustee (*Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* [2006] FCA 1438); and
- 47.2. Where the relationship between the trustee and the bankrupt is shown to be such that a fair-minded person informed of the facts could reasonably entertain a doubt as to his or her capacity to be independent in circumstances in which he or she was required to investigate the bankrupt's past conduct, it is not appropriate for the trustee to continue to act in the administration of the estate (*Re: Peter Challen (a bankrupt); ex parte Andrew Brown; Graham Bendeich*, unreported, (Beaumont J) 23 April 1996, at pp 3-4).



48. Further, under the Act, Ms Thomson was required to carry out the following duties and functions:

- 48.1. ss 19(1)(b), determining whether the estate includes property that can be realised to pay a dividend to creditors;
- 48.2. ss 19(1)(f), taking appropriate steps to recover property for the benefit of the estate; and
- 48.3. ss 19(1)(g), taking whatever action is practicable to try to ensure that the bankrupt discharges all of the bankrupt's duties under this Act.

***Findings of the Committee in relation to the Failure to Adequately and Properly carry out the General Law Duty to Avoid Conflicts of Interest***

49. The Committee considers that Ms Thomson placed herself in a conflict of interest in her role as the trustee of the bankrupt estate of Mr M by:

- 49.1. Accepting the appointment as Mr M's trustee in circumstances where:
  - 49.1.1. she had received three referrals from him in the preceding ten months, and;
  - 49.1.2. she had, within the preceding nine months, received a communication from a third party expressing concerns about her relationship with Mr M in the context of two of those referrals;
- 49.2. Upon her appointment as trustee, failing to disclose to creditors the fact that she had received referrals from Mr M and to state her reasons for believing that no conflict of interest arose;
- 49.3. During the period of Mr M's bankruptcy, continuing to occupy the position of trustee in circumstances where:
  - 49.3.1. she became trustee in two estates in which Mr M was involved, through his continued involvement with the Company (where the Company was the petitioning creditor in respect of one of the individuals, and the other individual was a client of Mr M<sup>19</sup>); and
  - 49.3.2. Mr M continued to participate in the administration of the estate of Mr F<sup>20</sup> in his capacity as a representative of the Company (for example, on 11 December 2013, he voted on its behalf to approve Ms Thomson's remuneration in that bankruptcy).<sup>21</sup>
- 49.4. During the period of Mr M's bankruptcy, failing to disclose to creditors that:
  - 49.4.1. she accepted two referrals in which Mr M was involved, and that he had continued to participate in the administration of Mr F (including by

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<sup>19</sup> *Materials* (pp 7-8)

<sup>20</sup> *Materials*, p 149

<sup>21</sup> *Materials*, p 152

voting on behalf of the Company to approve Ms Thomson's remuneration); and

49.4.2. she received two communications (from one creditor and one person who expected to become a creditor) expressing concerns about her pre-appointment relationship with Mr M and her administration of his bankrupt estate.

50. The two communications referred to above at 49.4.2 and 49.1.2 were as follows:

50.1. First, on 29 November 2013, Ms Thomson received an email from Mr Y (a pseudonym)<sup>22</sup>, in which he stated:

*...It's interesting that your name/firm is associated with the Mr M bankruptcy. I bring some interesting facts to your attention that I know you would probably choose NOT to know. Note that now you know and being his trustee in bankruptcy I TRUST that you would do as the court appointed you to do and that is the right thing and investigate as I will continue my investigations on Mr M and your good self. Hopefully in the not too distant future I will be a creditor of Mr M's bankrupt estate and I will appoint my lawyers to make a full investigation as to your conduct in his bankruptcy...; and*

50.2. Second, on 4 March 2015, Ms Thomson received a facsimile from a solicitor, Mr R (a pseudonym), who acted for a creditor in Mr M's bankrupt estate.<sup>23</sup> In this letter, Mr R requested information about the inquiries made by Ms Thomson into the leasehold villa right in Bali as disclosed in Mr M's Statement of Affairs (the **Bali Villa Right**), and sought an appointment to review the records held by Ms Thomson for the estate of Mr M. He also stated:

*...We note that you have provided a Declaration of Trustee's Independents (sic). Can you please disclose to us any engagement within the last three years where Mr M or a company in any way associated with him has been either a creditor, a debtor or an advisor of any entity related to your engagement...*

## **Discussion**

### *Material before the Committee*

51. The Committee has found that, based on the Materials, Ms Thomson and Mr M were in a referral relationship at the time of her appointment as trustee of his bankrupt estate.
52. The Committee has also found that the Materials indicate that the relationship between Ms Thomson and Mr M had already been raised as a matter of concern by a creditor in the Mrs and Mr C bankruptcies prior to Ms Thomson's appointment: a memorandum of a telephone conversation on 4 February 2013 between

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<sup>22</sup> *Materials* (pp 146-7)

<sup>23</sup> *Materials* (pp 589-90) This letter is addressed to Mr L (a pseudonym), "The Manager, Veritas Advisory", but refers to the Declaration of Independence prepared by Ms Thomson

Ms Thomson and the creditor refers to the creditor's allegation of a conflict of interest involving Ms Thomson and Mr M.<sup>24</sup>

53. The Committee considers that, taken together, these facts, which existed at the time Ms Thomson was deciding whether to consent to the appointment as trustee, support a finding that a fair-minded person informed of the facts could reasonably entertain a doubt as to her capacity to be impartial in the performance of her duties as trustee.
54. This was because it was likely that, if appointed, Ms Thomson would need to examine Mr M's conduct, for example, if she identified antecedent transactions requiring investigation. Mr M's personal interests were also likely to be directly affected by decisions made by Ms Thomson in her capacity as trustee with regard to income contributions, the identification and realisation of assets for the benefit of creditors, and applications by Mr M for permission to travel overseas. In the context of the referral relationship which the Committee has found to have existed at the time of Ms Thomson's appointment, there was potential for Ms Thomson's duties as trustee of Mr M's bankrupt estate to come into conflict (or be seen to do so) with her personal interests as an insolvency practitioner who had received referrals from Mr M if she accepted the appointment.
55. The issues raised by the appointment of a trustee to a bankrupt estate where they have a prior association with the bankrupt were summarised by French J (as he then was) in *Starkey v Rondo Building Services Pty Ltd* [2005] FCA 1081:

*The partiality which the trustee would have to avoid in such a case has two possible manifestations. One would be the making of a decision favourable to the bankrupt because of the personal relationship or connection. The other manifestation would be the making of a decision unfairly adverse to the bankrupt because of concern that the relationship or connection might be perceived as affecting the trustee's independence. The duty of the trustee of which the trustee is or should be aware is to be independent and to be seen to be independent. For if the trustee is not seen to be independent there will be a lack of confidence in the decisions which he or she has made and the possibility of challenges to decisions taken which would not otherwise arise. The very making of such challenges can impose delay and expense in connection with the administration of the estate.*<sup>25</sup>
56. The Committee recognises that referral relationships form part of the professional networks that exist in the insolvency industry, and notes that the Materials contain no evidence of impropriety in the referral relationship between Ms Thomson and Mr M. However, the connection between Ms Thomson and Mr M at the time that she became his trustee was relevant to the question of her independence, and Ms Thomson had a duty to ensure that her independence was not compromised.
57. Despite this, Ms Thomson accepted the appointment to act as trustee of Mr M's estate.

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<sup>24</sup> *Materials* (pp 578-9, 580-1)

<sup>25</sup> At [70]

58. The Committee considers that an “adequate” level of performance in relation to Ms Thomson’s general law duty to avoid conflicts of interest, including avoiding of a perception of partiality, both as at 29 October 2013 and now, would have been to decline the appointment.
59. Performing this duty “properly”, in terms of the standard of performance required, according to the expectations of the profession, would have involved a decision-making process based on a consideration of the requirements for independence under the general law, as well as any relevant professional standards, and industry codes of conduct, such as the ARITA Code of Conduct and the APES.
60. This consideration may also have been informed by consultation with an independent person, such as a representative of a professional body, or an officer from AFSA Regulation, and this consultation would have been documented.
61. The Committee notes that Ms Thomson indicated during the Interview that she did consider the issue of independence prior to accepting the appointment, and referred to a discussion she had with the principal of the firm where she worked, as well as her research of the APES.<sup>26</sup> However, the Materials did not disclose any records of these discussions, or the conclusions drawn from them.
62. The Committee considers that, in the circumstances, Ms Thomson’s conduct fell short of the standard required of a registered trustee.
63. The Committee has also considered the evidence before it regarding events that occurred during Ms Thomson’s administration of Mr M’s estate. The Committee has found that, on the evidence in the Materials (in particular, the contents of the emails exchanged by Ms Thomson and Mr M between 13 January 2014 and 28 October 2016<sup>27</sup>) as set out above at paragraphs 9 and 10, the referral relationship continued during the period of Mr M’s bankruptcy.
64. In the Committee’s view, the Materials disclose five further events that should have prompted Ms Thomson to reconsider whether she was, or could be perceived as being, not independent in her role as trustee. These events were characterised in the SCN as factors that “made the conflict particularly serious.”<sup>28</sup>
- 64.1. First, in both of the Report to Creditors<sup>29</sup> and the Initial Notice to Creditors<sup>30</sup> of Mr M’s bankrupt estate prepared by Ms Thomson, dated 30 October 2013 and 26 November 2013, respectively, and the Declarations of Trustee’s Independence attached to these reports, Ms Thomson failed to report to creditors her pre-existing relationship with Mr M, including the referrals received in the preceding 10 months. She also failed to provide reasons for believing there was no conflict of interest (following her consideration of the

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<sup>26</sup> Interview, paragraph 59 (pp 17-19)

<sup>27</sup> Materials (pp 163-5, 216-8 and 220-1)

<sup>28</sup> Materials (p 6)

<sup>29</sup> Materials (pp 86-8)

<sup>30</sup> Materials (pp 117-45)

matter) and stated, in both reports, that there were “no other prior professional relationships or engagements that should be disclosed.”<sup>31</sup>

- 64.2. Second, during the administration of Mr M’s estate, the issue of conflict of interest was raised by two individuals directly with Ms Thomson, as set out above at paragraphs 50.1 and 50.2. Neither of these creditor concerns were communicated to the general body of creditors in the administration, nor were the steps taken (if any were taken) to consider or address these concerns documented or recorded.
- 64.3. Third, during her administration of the Mr M estate Ms Thomson had lunch on two occasions with Mr M at which information concerning the bankruptcy (travel requests) was discussed.<sup>32</sup>
- 64.4. Fourth, during the period of his bankruptcy, Mr M continued to be involved with the Company (notwithstanding that his status as a director ceased on 29 October 2013<sup>33</sup>) in relation to one of the previously referred bankruptcies (the estate of Mr F) and in doing so, voted on its behalf to approve Ms Thomson’s remuneration in that bankruptcy.<sup>34</sup>
- 64.5. And fifth, Mr M was involved in the appointment of Ms Thomson as trustee to two further bankrupt estates and communicated directly with Ms Thomson about them between 13 January 2014 and 28 October 2016.
- 65. The Committee considers that these five incidents demonstrate that the relationship between Ms Thomson and Mr M during the period of Mr M’s bankruptcy was such that a fair-minded observer informed of the facts would reasonably entertain a doubt as to Ms Thomson’s capacity to be independent in her role as trustee of Mr M’s bankrupt estate.
- 66. In the Committee’s view, the expectation of the profession in respect of each of the circumstances set out above at paragraph 64 would have been for Ms Thomson to disclose the relevant facts to the body of creditors and take steps to have a replacement trustee appointed under s 181A of the Act, or seek directions from the Court as to her position. As she did not do either of these things, the Committee considers that Ms Thomson failed to properly and adequately carry out her duty as a registered trustee under the general law to avoid conflicts of interest.
- 67. Further, as Ms Thomson failed to take – or consider taking – these steps, and continued to occupy the position of Mr M’s trustee, the Committee has formed the view that, from at least 13 January 2014 (when Ms Thomson responded positively to an email from Mr M about a “new matter”<sup>35</sup>), she was in a position of actual conflict. This is because, according to the Material before the Committee, the referral

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<sup>31</sup> *Materials* (pp 88, 123)

<sup>32</sup> *Materials* (p 201)

<sup>33</sup> *Materials*, p 101

<sup>34</sup> *Materials* (p 152)

<sup>35</sup> The bankrupt estate of Mr B

relationship that had existed prior to her appointment, and which gave rise to an apparent or potential conflict of interest at the time of accepting the appointment, continued to exist.

68. Putting to one side the fact that the Committee considers Ms Thomson ought not to have accepted the appointment in the first place, the Committee is of the view that it should have been apparent to a practitioner of Ms Thomson's experience, at the time of accepting the appointment as Mr M's trustee in bankruptcy, that their referral relationship should cease.
69. Therefore, by continuing the relationship during the period of the bankruptcy, Ms Thomson was in a position of actual conflict, because a feature of a referral relationship is that it is mutually financially beneficial. Therefore, Ms Thomson's capacity to act, and to be perceived to act, independently and impartially, was compromised because of the ongoing referral relationship, which has as one of its elements a potential future benefit for the trustee in continuing to receive referrals from the referrer.<sup>36</sup>
70. The Committee also notes that, once a relevant conflict of interest exists, a reasonable apprehension of a lack of independence and impartiality follows, "almost as of course."<sup>37</sup> The fact that two creditors raised concerns about Ms Thomson's independence during the period of the bankruptcy supports this conclusion.
71. Finally, Ms Thomson's apparent failure to reflect on the circumstances of her appointment and the consequences for the administration of the bankrupt estate, even when concerns were raised by creditors about her independence during the course of Mr M's bankruptcy, was raised as a matter of particular concern by the Delegate in the SCN. The Committee therefore sought Ms Thomson's response to this matter specifically during the Interview.

*Responses by Ms Thomson to the SCN and at interview*

72. At the Interview, Ms Thomson accepted, in a limited way, that she now appreciated she was conflicted at the time she accepted the appointment as Mr M's trustee. However, she rejected the proposition that there was an actual, as opposed to a perceived, conflict of interest created by her appointment:

*With regard to my appointment as Mr M's trustee and with the benefit of hindsight, I can now understand why I ought not have accepted the appointment as trustee of Mr M's bankrupt estate. It is important for me to emphasise that no actual conflict arose as a result of me acting for Mr M as Mr M's trustee. However, given he had referred work to me I acknowledge that I should have refused to consent.*<sup>38</sup>

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<sup>36</sup> *ASIC v Franklin (Liquidator), re: Walton Constructions Pty Ltd* (2014) 233 FCR 204 (White J at [125])

<sup>37</sup> *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504, per Spigelman CJ, referred to by White J in *ASIC v Franklin (Liquidator), re: Walton Constructions Pty Ltd* (2014) 233 FCR 204

<sup>38</sup> *Interview*, paragraph 50 (p 13)

73. Ms Thomson also stated that, before accepting the appointment to the Mr M estate, she discussed the matter with the principal of her firm and referred to the APES. She indicated that the APES did not list a referrer as a person from which the practitioner should not take an appointment,<sup>39</sup> and that she referred to some case law but had become aware of other case law since that time.<sup>40</sup> She also referred to the Schedule, “as it currently is”<sup>41</sup>, which the Committee understood to be a reference to the fact the Schedule came into operation in 2017. The Committee considers that Ms Thomson’s responses indicate that, at that time of her appointment as trustee of the Mr M estate, she had a limited understanding of the general law obligation of no conflict.
74. In relation to the fact that a creditor had, on 4 February 2013, prior to Ms Thomson’s appointment to the Mr M estate, raised a claim in relation to conflict of interest (as set out above at paragraph 52), Ms Thomson indicated that “this particular allegation...didn’t enter into my brain...because I had resolved it.”<sup>42</sup> She agreed with the Committee when the Committee characterised the claim being made by the creditor as “a sensitive issue” and something that Ms Thomson “was already on notice of.”<sup>43</sup>
75. Finally, in relation to the involvement of Mr M in the bankruptcies that had been referred to Ms Thomson prior to her appointment to the Mr M estate, Ms Thomson in her Response made an argument about the eligibility to vote of Mr M, for example as representative of the Company.<sup>44</sup> However, the Committee is not concerned with Mr M’s eligibility to vote as such but rather with the evidence of his continued involvement in a referred bankruptcy after the date of Ms Thomson’s appointment.

#### *Submissions*

76. Submissions made on behalf of Ms Thomson include that the SCN and Materials contain no suggestion of “fraud, dishonesty, (or) a personal interest being advanced.”<sup>45</sup> However, the Committee’s concern is with the nature of the referral relationship in which Mr M referred matters to Ms Thomson and therefore provided a source of revenue for her practice. In this sense, the relationship incorporated an element of personal interest.
77. Ms Thomson has submitted that the number of referrals was “minimal.”<sup>46</sup> The Committee considers the issue of conflict of interest is not a question of the volume of work referred by Mr M as a proportion of her overall practice, but a question of

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<sup>39</sup> *Interview*, paragraph 59 (p 17)

<sup>40</sup> *Interview*, paragraph 82 (p 19)

<sup>41</sup> *Interview*, paragraph 86 (p 19)

<sup>42</sup> *Interview*, paragraphs 149-153 (p 22)

<sup>43</sup> *Interview*, paragraphs 170-9 (p 23)

<sup>44</sup> *Materials* (p 636)

<sup>45</sup> *Interview*, paragraph 47 (p 12)

<sup>46</sup> *24 February Submission*, para 4.4(b) (p 4);

whether the relationship was such that a reasonable fair-minded observer might consider that Ms Thomson had a personal interest which conflicted with her duties.<sup>47</sup>

78. Ms Thomson also submits that the conduct in the show cause notice is historical and does not suggest “a systemic or continuing pattern of behaviour,”<sup>48</sup> occurring only in a “narrow aspect of Ms Thomson’s professional work as a registered bankruptcy trustee.”<sup>49</sup> However, submissions made on Ms Thomson’s behalf appear to indicate that her lack of understanding of the scope of her obligations under the no conflict duty continued up until the commencement of the current disciplinary procedures, at which point, “as a result of this process”, she reflected on the importance of the no conflict duty.<sup>50</sup>
79. Finally, Ms Thomson’s submissions point to her recent actions in making changes to procedural systems in the form of management software and a compliance manager.<sup>51</sup> However, the Committee is of the view that, while such systems can go some way to identify an actual or potential conflict, the risk of a conflict arising remains where the registered trustee does not fully appreciate the scope of the obligation.

*Committee’s conclusions*

80. The Committee considers that Ms Thomson failed to adequately and properly carry out the general law duty to avoid a conflict of interest, and that this failure was significant.
81. In the Committee’s opinion, Ms Thomson has not shown a high level of insight into her past failure to understand the no conflict obligation and she has not demonstrated her current knowledge of the scope of the no conflict obligation such that the committee can be assured the risk of the recurrence of the types of events as occurred in relation to the Mr M estate has been reduced.

***Findings in relation to the Failure to Adequately and Properly carry out the duties and functions that Ms Thomson was required to carry out under the Act***

82. The Committee considers that Ms Thompson failed to carry out adequately and properly the following duties under the Act:
- 82.1. ss 19(1)(b), determining whether the estate includes property that can be realised to pay a dividend to creditors;
- 82.2. ss 19(1)(f), taking appropriate steps to recover property for the benefit of the estate; and

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<sup>47</sup> *ASIC v Franklin (Liquidator), re: Walton Constructions Pty Ltd* (2014) 233 FCR 204 (White J at [95])

<sup>48</sup> *3 April 2020 Submissions*, paragraph 11 (p 3);

<sup>49</sup> *10 March 2020 Submissions*, paragraph 18.3 (p 4)

<sup>50</sup> *Interview*, paragraph 46 (p 11)

<sup>51</sup> *Response*, paragraph 4.17.6 (d)-(d) (*Materials*, p 653), *10 March 2020 Submissions*, paragraph 18.2 (p 4)



82.3. ss 19(1)(g), taking whatever action is practicable to try to ensure that the bankrupt discharges all of the bankrupt's duties under this Act.

### **Discussion**

#### *Material before the Committee*

83. The Material before the Committee indicates that:
- 83.1. Ms Thomson received information from Mr M regarding Indonesian property law, in respect of the Bali Villa Right, and accepted his assessment that the interest was too difficult to recover without conducting proper, independent investigations;<sup>52</sup>
- 83.2. Ms Thomson undertook assessments for the purpose of calculating income contributions by Mr M which did not take into account fringe benefits received by him in the form of rent-free accommodation and business class travel overseas;<sup>53</sup>
- 83.3. Ms Thomson approved three requests by Mr M to travel overseas (on 11 November 2013<sup>54</sup>, 10 July 2014<sup>55</sup> and 27 October 2015<sup>56</sup>) without first appropriately assessing whether or not to grant the requests, and in circumstances where she received information about a proposed trip during a lunch with Mr M, which was an inappropriate context in which to obtain information from a bankrupt.
84. The Committee is of the view that, in respect of each of the three statutory duties considered as part of this ground, an adequate and proper performance of these duties would have comprised the following actions:

#### **In relation to the assessment of Mr M's travel requests:**

85. The Committee notes that it is an offence for an undischarged bankrupt to travel overseas without the permission of the trustee pursuant to ss 275(1)(c) of the Act and accordingly a proper and adequate assessment of a travel request is a fundamental obligation of a trustee.
86. The Committee is of the view that the adequate and proper practice, in assessing a bankrupt's request to travel overseas, is for a trustee to seek relevant information and supporting documentation, such as:
- 86.1. the reasons for travel and the countries to be visited by the bankrupt;
- 86.2. the dates that the bankrupt intends to leave and return to Australia;

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<sup>52</sup> *Materials* (pp 166-182)

<sup>53</sup> *Materials* (pp 183-201 and 210-5)

<sup>54</sup> *Materials*, (pp 91-2)

<sup>55</sup> *Materials*, (pp 206)

<sup>56</sup> *Materials*, (pp 207-9)

- 86.3. the bankrupt's contact details including email address, phone number and overseas address where the trustee can contact the bankrupt;
- 86.4. the bankrupt's expected income per year;
- 86.5. the bankrupt's plans to meet any compulsory income payment plans;
- 86.6. the details of who is paying for the cost of the travel, including a letter from that person if it is not the bankrupt; and
- 86.7. if the bankrupt is travelling for work, evidence to support this.

Finally, the trustee ought to document their assessment of this information to reflect the trustee's decision regarding the overseas travel request.

- 87. The Committee's assessment of the Materials is that there is no record of Mr M providing all of the information set out above at paragraph 86 in relation to any of his three travel requests. While some of this information was provided in respect of the third request, on 26 October 2015, the Materials indicate that the information was requested by a staff member at Ms Thomson's firm after the decision to grant permission had already been made.<sup>57</sup>
- 88. The Committee considers that:
  - 88.1. a decision to grant a travel request can only be properly made after the receipt of the information set out above at paragraph 86. The information can then be properly assessed by the trustee to ensure that the bankrupt is up to date and compliant with their obligations to assist the trustee and provide information. With regard to Mr M, this would have included, in particular, information in relation to the ongoing investigation of the Bali Villa Right and funding of the travel by Mr M's spouse;
  - 88.2. a decision to grant a travel request prior to, or in the absence of, the provision and consideration of the necessary information is neither a proper nor adequate application of the trustee's duty to consider the travel request; and
  - 88.3. once an assessment of the application is complete, the trustee must, to adequately and properly record the decision, prepare a detailed file record documenting the reasoning for the decision.

#### **In relation to the assessment of Mr M's income contributions**

- 89. Subsection 134(1)(i) of the Act gives the trustee the power to obtain advice or assistance considered desirable relating to the affairs of the bankrupt.

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<sup>57</sup> An email was sent to Mr M on 26 October 2015 in the following terms:

"Hi Mr M  
Thanks for your email.

Louise is happy to grant you permission to travel overseas, could you please provide the following:..."

*Materials* (p 208)

90. The Committee is of the view that in respect of the assessment of the value of rental accommodation as part of the trustee's determination of any compulsory income contributions to be made by the bankrupt, a trustee properly and adequately conducting an assessment of rental accommodation should enlist the advice of an expert, registered local real estate agent to provide an opinion on the market rental for the accommodation of the bankrupt.<sup>58</sup> As an alternative, in the unlikely event that the advice of a real estate agent was not available, a trustee would be able to search real estate websites that provide more general rental information in specific areas, and make records of the searches conducted (eg: screen shots). The Committee notes these services were available during the period of Mr M's bankruptcy.
91. The Committee considers that a bankruptcy trustee, without training and registration as a real estate agent, lacks the ability to provide an appropriate assessment of the value of rental accommodation. Ms Thomson agreed during the Interview that she did not hold any real estate qualifications.<sup>59</sup>
92. With respect to the investigation of travel benefits as part of a trustee's determination of income contributions, the Committee finds that the provision of business class airfares to a bankrupt would warrant a higher level of scrutiny than usual by a trustee, in order to properly and adequately assess the inclusion of the value of those benefits into an assessment, particularly in circumstances where there were ongoing investigations into potential assets located in the countries to which a bankrupt was travelling. The Committee is also of the view that, in these circumstances, a trustee ought to seek particulars from the provider of the travel benefits, and not simply rely on the bankrupt's advice, when making an assessment.
93. Section 139L of the Act is clear in its definition of what benefits provided to a bankrupt constitute 'income' as defined and within the meaning of the *Fringe Benefits Tax Assessment Act 1986*. They include travel and accommodation benefits. A trustee must consider and assess the value of those benefits when conducting a compulsory income assessment. The Committee is of the view that the failure to include both travel and accommodation benefits in the assessment constitutes a failure to properly and adequately assess the compulsory income contributions, which may deprive the estate and creditors of recoveries otherwise available to it.
94. The Committee also notes that once an assessment of the income is complete, the trustee must, to adequately and properly record the decision with reasoning, prepare a detailed file record documenting that decision as well as the assessment notice issued to the bankrupt. However, on the Materials available to the Committee, it finds that the investigations and assessments described above at paragraphs 89-93 were not undertaken.<sup>60</sup>

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<sup>58</sup> The Committee notes that real estate agents frequently provide market appraisals to insolvency practitioners at no cost.

<sup>59</sup> Interview, paragraph 376 (p 36)

<sup>60</sup> Materials (pp 183-201 and 210-5)

**In relation to the Bali Villa Right**

95. A trustee has a duty under ss 19(b) of the Act to determine (by way of investigation) whether the estate includes property that can be realised to pay a dividend to creditors. A trustee also has a duty to act commercially and efficiently.
96. The Committee is of the view that:
- 96.1. a trustee would be expected to not rely solely on the assertions and evidence of a bankrupt when investigating a potential asset in an overseas jurisdiction. A trustee would be expected to be sceptical and questioning in respect of that investigation, particularly where a creditor has raised queries about the investigations undertaken by the trustee into the asset,<sup>61</sup> as well as frequent travel requests to that jurisdiction;
  - 96.2. while an estate may be unfunded, the potential for a real property divisible asset overseas needs significant investigation above and beyond the assertions of a bankrupt, who may have an interest in preventing the asset becoming available to creditors;
  - 96.3. an independent assessment of the legal status of an interest in a Bali villa needs to be more thoroughly investigated beyond conducting online searches for information. Instead, these searches would be the starting point for the investigation;
  - 96.4. there are other cost-effective resources available to trustees to properly and adequately conduct investigations at a minimal cost as to a bankrupt's rights in a villa in Bali, including:
    - 96.4.1. contacting an Australian law firm that has an office in Indonesia to obtain preliminary advice on how further investigations may be done;
    - 96.4.2. contacting a law firm in Indonesia directly;
    - 96.4.3. contacting an Indonesian insolvency practitioner or member of INSOL<sup>62</sup> for advice on how an investigation may be conducted.
97. In the Committee's view, the investigations described above at paragraph 96.4 could be conducted with minimal cost to the trustee's firm or the estate (often at no cost). At a minimum, these investigations would either confirm or cast doubt on the bankrupt's assertions due to the independence of the third party provider.
98. The Committee also considers that:
- 98.1. to properly and adequately investigate the potential interest in an overseas asset, a trustee must at minimum seek out independent advice as to these rights and subsequently make an assessment on the commerciality of pursuing recovery, if any avenues for doing so exist;

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<sup>61</sup> *Materials* (pp 589-90)

<sup>62</sup> The International Association of Restructuring, Insolvency & Bankruptcy Professionals

- 98.2. the failure of a trustee to carry out independent and inexpensive initial investigations may deprive the estate and creditors of a potential recovery; and
- 98.3. once an investigation is complete, a trustee must, to adequately and properly perform their duties under ss 19(1)(b), (f) and (g) of the Act, record the decision by preparing a detailed file record documenting the investigation and the reasoning for the decision, including the reasoning in relation to the commerciality of the decision.
99. In each of the instances detailed in the SCN, the Committee's assessment, based on the Materials available to it, and the expectations of the profession, is that Ms Thomson failed to adequately and properly perform the duties under ss 19(1)(b), (f) and (g) of the Act, as there is no record of her:
- 99.1. fully documenting the three decisions to permit Mr M's travel requests, particularly in light of the ongoing investigations into the Bali Villa Right;
- 99.2. including and evidencing the travel and accommodation benefits in the compulsory income contribution assessments; or
- 99.3. independently investigating and evidencing the Bali Villa Right and any potential recovery to the estate.

*Submissions and Responses at interview*

100. In her Response, Ms Thomson accepted that insufficient or no account was taken of Mr M's overseas travel and accommodation in Mosman in calculating his income contribution assessments.<sup>63</sup> However, she did not agree that she "uncritically accepted" Mr M's assessment that the Bali Villa Right was too difficult to pursue, whilst conceding that "the details and basis for her decision in relation to this matter were not clearly identified in the records maintained by her in respect of Mr M's bankrupt estate."<sup>64</sup>
101. Ms Thomson also accepted in her Response that during her administration of the Mr M estate she had lunches with Mr M at which information concerning the bankruptcy (travel requests) were discussed. She indicated that, having taken advice, she now accepted that her decision to attend lunches with an undischarged bankrupt under her control "could give rise to a belief that she was not acting independently or otherwise a perception of conflict."<sup>65</sup> However, she asserted that the travel requests were not improperly granted as a consequence of her "not acting independently or otherwise in conflict with her duties" as trustee.<sup>66</sup>
102. At the Interview, Ms Thomson maintained this position, stating:

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<sup>63</sup> Response, paragraph 4.5 (*Materials*, p 686)

<sup>64</sup> Response, paragraphs 4.6-4.9 (*Materials*, pp 686-7)

<sup>65</sup> Response, paragraph 4.11 (*Materials*, p 687)

<sup>66</sup> Response, paragraph 4.12.3 (*Materials*, p 687)

*I regret my decision to have had lunch with Mr M. Whilst I did not myself perceive that as a social occasion, I reiterate that having lunch with him did not give rise to any preferential treatment. I now appreciate that such perception may possibly have occurred to a fair-minded lay observer.*<sup>67</sup>

103. Ms Thomson also responded to questions by the Committee regarding her decisions to grant approval to Mr M to travel overseas on three occasions, indicating that, in relation to a request to travel to a wedding, she sought the following information:

*Just – I said, “Who’s paying for it? Where are you staying? Where are you staying when you have stopovers? Why are you having this stopover? What is the purpose of this payment?”*<sup>68</sup>

104. Ms Thomson explained that she believed she or her staff had file-noted these inquiries, in the form of emails and checklists, with the exception of the first request.<sup>69</sup>

105. The Committee notes that, in her opening statement during the Interview, Ms Thomson stated:

*On reviewing the material before the committee I acknowledge that my assessment and analysis of Mr M’s income did not sufficiently take into account all relevant fringe benefits. It is difficult for me now after the passage of time to recall all the steps I undertook then to ascertain the amount. I acknowledge that a more detailed consideration of Mr M’s financial position including possible fringe benefits from accommodation and travel were warranted. Regrettably, that did not occur.*<sup>70</sup>

106. Ms Thomson answered questions by the Committee regarding the steps she took to assess the fringe benefits from accommodation, indicating that she based her assessment of the value of the accommodation that Mr M received on her own knowledge and experience of rental costs in Mosman, “having lived there for seventeen years” (herself).<sup>71</sup> She acknowledged that she did not document her research in this regard, or approach a real estate agent for information.

107. In relation to the Bali Villa Right, she described her investigations as follows:

*I firstly went to these particular sites that Mr M had, and then I did a Google search to find out whether there was anything else. The ones that popped up were largely the same ones, and I went, “Well, I’ve gone through the other ones”. It didn’t seem to provide me with any insight and, therefore, I – in fact, these ones were pretty comprehensive. They gave me a complete understanding of how the legal system works in regard to Indonesia....My only option after that would be to engage a solicitor or lawyer, probably, what they call them in Indonesia, and that would be costly.*<sup>72</sup>

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<sup>67</sup> Interview, paragraph 53 (p 14)

<sup>68</sup> Interview, paragraph 352 (p 35)

<sup>69</sup> Interview, paragraph 356 (p 35)

<sup>70</sup> Interview, paragraphs 52-3 (pp 13-4)

<sup>71</sup> Interview, paragraphs 371-88 (pp 36-7)

<sup>72</sup> Interview, paragraph 310 (p 32)

108. However, the Committee notes that no file notes or documentation of these independent investigations were available in the Materials, and Ms Thomson was unable to recall the name of the person with expertise in Indonesian law, whom she said that she called in relation to this matter, but who told her that he was no longer practising in the “law in Asia” area.<sup>73</sup>

*Committee’s conclusions*

109. Taking into account the Materials, and the responses provided by Ms Thomson during the Interview, the Committee’s view is that, considered individually, each instance of a failure by Ms Thomson to adequately and properly perform her duties under ss 19(1)(b), (f) and (g) of the Act is towards the lower end of the scale of seriousness. However, taken together, and combined with the lack of proper record keeping in Mr M’s bankrupt estate (which the Committee considers to be part of properly discharging the duties under ss 19(1)(b), (f) and (g) of the Act), the Committee regards these failures as substantive.
110. The Committee has taken into account the submissions made on behalf of Ms Thomson that the estate was unfunded, and she was conscious of her obligation to act efficiently in her administration of the estate. However, the Committee is of the view that it was nonetheless important for Ms Thomson to make contemporaneous records of her inquiries and consideration of these factors, to provide proper accountability for the decisions made and thus address potential queries regarding independence.
111. Therefore, the Committee finds that ground one is made out.

**Particularised Ground Two - ss 40-40(1)(p) of the Schedule**

112. According to the SCN, Ms Thomson has failed to comply with Paragraph 2.3, entitled “Conflicts of Interest”, as formerly prescribed by “regulations made for the purpose of ss 155H(5) of the old Act”:

If during an administration, it becomes apparent that the trustee has an actual or potential conflict of interest in relation to the administration, the trustee must, as soon as practicable after becoming aware of the conflict of interest,

- a) Notify the creditors, the person who appointed the trustee, a committee of inspection or the court, as appropriate, of the conflict of interest; and
- b) Take appropriate steps to avoid the conflict of interest.

Examples: Conflicts of interest

- 1. The appointer or, in the case of a sequestration order, the bankrupt is or was a client of the trustee or the trustee’s firm in relation to a financial, trust or insolvency planning matter.
- 2. The trustee or a member of the trustee’s firm is a personal friend, relative or business associate of the debtor.

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<sup>73</sup> Interview, paragraph 312 (p 32)

## **Discussion**

### *Material before the Committee*

113. The Committee has given careful consideration to the second ground, as there appears to be substantial overlap between the subject matter of this ground with the first ground. However, on close examination the Committee has formed the view that the second ground, as set out in Paragraph 2.3, raises distinct issues.
114. The first distinguishing factor is that the relevant facts and circumstances covered by paragraph 2.3 arise “during an administration.” Therefore the Committee has confined its consideration of this ground to the period after the date on which Ms Thomson became the trustee of Mr M’s bankrupt estate.<sup>74</sup>
115. The second distinguishing factor is that, according to the wording of Paragraph 2.3, the requirement that Ms Thomson take the steps set out in sub-paragraphs (a) and (b) arose “as soon as practicable *after becoming aware* of the conflict of interest.” (emphasis added)
116. Ms Thomson accepted in her Response that Paragraph 2.3 contained an objective test, describing the basis for this ground as follows:
- ...at various times after 29 October 2013:*
- a) *It ought to have become apparent to (Ms Thomson) that she had an actual or potential conflict of interest or lack of independence or otherwise recognise(d) that a reasonable person might have a perception of conflict in relation to her ongoing administration of Mr M’s bankrupt estate...*<sup>75</sup>
117. As set out above at paragraphs 50.1 and 50.2, the Material before the Committee included two communications sent to Ms Thomson (or to the firm where she worked) on 29 November 2013 and 4 March 2015.
118. The Committee has found that both of these communications disclosed concerns held by creditors (or, in Mr Y’s case, a person who expected to become a creditor) in Mr M’s bankrupt estate about Ms Thomson’s independence. As set out above at paragraph 50.1, the email from Mr Y referred to Ms Thomson’s obligation to “do the right thing and investigate”; while the letter from Mr R, set out above at paragraph 50.2, sought information relevant to Ms Thomson’s Declaration of Trustee’s Independence, including details of any engagements within the preceding three years involving – directly or indirectly – Mr M.
119. The letter from Mr R also specifically queried the steps taken by Ms Thomson to ascertain the value of the Bali Villa Right and whether or not it was transferable. In essence, both of these communications queried Ms Thomson’s capacity to act impartially in her role as trustee, and whether Ms Thomson’s personal interests

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<sup>74</sup> This approach to ground two was also adopted by Ms Thomson in her *Response*, at paragraph 2.2.2, *Materials* (p 672)

<sup>75</sup> *Response*, paragraph 2.2.2 (*Materials*, p 672)



conflicted with her professional duties and obligations as trustee of Mr M's bankrupt estate. Therefore, the Committee finds that Paragraph 2.3 was engaged.

120. The Committee considers that it "became apparent" on two occasions during the period of Mr M's bankruptcy (ie: on 29 November 2013 and 4 March 2015) that Ms Thomson had a potential or actual conflict of interest in relation to the administration of Mr M's bankrupt estate, because concerns about her independence and impartiality were communicated to her by two separate individuals.
121. The material before the Committee also disclosed that Ms Thomson's response to these communications, once she became aware of them, did not comply with Paragraph 2.3, because she neither notified the persons set out in sub-paragraph (a), nor took appropriate steps to avoid the conflict of interest, as required by sub-paragraph (b). First, in relation to the email from Mr Y, Ms Thomson forwarded the email to a colleague with an instruction to address the matter<sup>76</sup>, and second, in relation to the letter from Mr R, it appeared from the Material before the Committee that a document relating to Indonesian land law was faxed to the law firm where Mr R worked on 22 March 2015.<sup>77</sup>
122. The Committee explored these responses with Ms Thomson further at the Interview, as there was no documentary material available to indicate that the concerns raised by Mr Y and Mr R were considered and addressed by her. Ms Thomson stated during the Interview that there were timesheets recording her actions in relation to the letter from Mr R<sup>78</sup>, however, these were not provided to the Committee.

*Response, statements and answers at the Interview, and Submissions by Ms Thomson*

123. Ms Thomson's position in the Response was that: "On and from 30 October 2013, for the purposes of paragraph 2.3 of the Applicable Performance Standards (Ms Thomson) actively considered whether she was in a position of actual or potential conflict of interest in her ongoing administration of (Mr M's) bankrupt estate, or otherwise lacked the necessary independence or otherwise whether any reasonable person might have a perception of conflict (and) did not determine that any such actual or potential conflict of interest, or lack of independence existed."<sup>79</sup>
124. Among the circumstances said in the Response to have informed Ms Thomson's self-assessment of her position was the fact that "...no issue was raised by any creditor with (Ms Thomson's) appointment as (Mr) M's trustee in bankruptcy, or her administration of (Mr) M's bankrupt estate."<sup>80</sup> However, as set out above at paragraph 118, the Committee has found that, in fact, issues were raised by two creditors (or potential creditors) on 29 November 2013 and 4 March 2015. The

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<sup>76</sup> *Materials* (p 146)

<sup>77</sup> *Materials* (p 591)

<sup>78</sup> *Interview*, paragraph 232 (p 27)

<sup>79</sup> *Response*, paragraph 4.3 (*Materials*, p 683)

<sup>80</sup> *Response*, paragraph 4.4.4(c) (*Materials*, p 683) and *Response*, paragraph 4.17.9 (*Materials*, p 691)

Committee therefore explored the subject of Ms Thomson's state of mind from time to time with her during the Interview, with specific reference to these two communications.

125. In her answers and statements during the Interview, Ms Thomson stated that, in the case of the communication from Mr Y dated 29 November 2013, she did not turn her mind to the issue of conflict of interest.<sup>81</sup> This is consistent with the Material before the Committee, which indicates that Ms Thomson delegated the task of responding to the communication to another person. Ms Thomson stated:

*I passed the first one along, because most of this was to do with the administration – the information under the administration itself – to my manager and asked her to take care of all of those things.*<sup>82</sup>

126. When asked whether she would normally respond to communications from creditors or their representatives raising the issue of conflicts of interest, Ms Thomson responded that she would normally. However, in this particular case, her response was as follows:

*Did I contemplate dealing with the conflict? No, because I have no recollection of even reading that part of it. I looked at it all of the substantive stuff in it and said, "I'm passing it on to "Ms J"" (a pseudonym). I said, "Look, can you take care of all of this?"*<sup>83</sup>

127. In response to queries about her response to the communication from Mr R dated 4 March 2015, Ms Thomson answered as follows:

*I actually organised a meeting with Mr R. I went to one of my office meeting rooms, where he and I spent a whole afternoon going through the whole file in regard to Mr M.*

*...I answered all his inquiries. He walked away with everything that he wanted to know.*<sup>84</sup>

128. She also stated:

*...I did in preparation for it, as well, to let him know what's involved, because I needed to put down in some sort of word what the actual issues were with regard to, for example, the Bali property. I had all of that stuff ready to go when he came in.*<sup>85</sup>

*And: ...the meeting literally covered everything that had gone on in the estate.*<sup>86</sup>

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<sup>81</sup> Interview, paragraphs 199-209 (pp 25-6)

<sup>82</sup> Interview, paragraph 199 (p 25)

<sup>83</sup> Interview, paragraph 209 (p 26)

<sup>84</sup> Interview, paragraphs 226-8 (p 27)

<sup>85</sup> Interview, paragraph 234 (p 27)

<sup>86</sup> Interview, paragraph 244 (p 28)

129. Ms Thomson confirmed that there was no file note made of this meeting, nor did she charge for it.<sup>87</sup> The Committee notes that the meeting was referred to in correspondence from Ms Thomson's legal representatives dated 3 July 2019, but no detail was provided apart from the date of meeting (13 March 2015).<sup>88</sup> Finally, Ms Thomson confirmed that there was no "general reporting to the general body of creditors" in relation to the communication from Mr R.<sup>89</sup>
130. The Committee finds that the responses given by Ms Thomson during the Interview and the submissions made on her behalf in the Response (in particular, her statements that she arranged a meeting with Mr R in response to his letter) indicate that she apprehended that the letter from Mr R raised a concern about her independence and, to the extent that the fact that this perception was held by Mr R, she was aware that an actual or potential conflict of interest existed as at 4 March 2015.

*"Business Associates"*

131. The submissions by Ms Thomson in relation to the second ground also focused on whether or not Mr M was a "business associate", for the purposes of Paragraph 2.3, or, in Ms Thomson's words: 'Just someone I knew...'<sup>90</sup> The circumstances in which Ms Thomson became acquainted with Mr M were described by Ms Thomson as follows:

*I was introduced to Mr M when I was at Hall Chadwick, I don't even recall when, by the tax partner at a function that the partnership was holding. And that was the first time I spoke with him, and never spoke to him again until I left Hall Chadwick, which was about two years later. And that was the extent of my knowledge of the man.*<sup>91</sup>

132. During the Interview, it was submitted on Ms Thomson's behalf that: "...as at that time, while she did know Mr M...that relationship, if you can call it that, tenuous as it was, did not rise to the position of being described as a business associateship."<sup>92</sup> It was also submitted that "a mere professional acquaintanceship does not create actual bias or reasonable perception of bias."<sup>93</sup>
133. The Committee considers that these submissions failed to address the fact that the descriptions of relationships giving rise to a conflict of interest that appear under Paragraph 2.3 are examples only. Instead, the emphasis is on the quality and dynamics of the relationship as disclosed on the facts available, and whether it offends the no conflict duty.

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<sup>87</sup> Interview, paragraphs 242-4 (p 28)

<sup>88</sup> Materials (p 483)

<sup>89</sup> Interview, paragraph 270 (p 29)

<sup>90</sup> Interview, paragraph 502 (p 46)

<sup>91</sup> Interview, paragraph 456 (p 43)

<sup>92</sup> Interview, paragraph 513 (p 47)

<sup>93</sup> Interview, paragraph 449 (p 42)

134. While the Committee considers that it is not strictly necessary to express a concluded view on whether the relationship between Ms Thomson and Mr M fitted the description of 'business associates', it has deliberated on this issue as part of this process. The Committee's researches have not revealed any relevant, analogous statutory formulations of the term 'business associates'.<sup>94</sup> And, the Committee is not aware of any decisions by previous Committees in respect of Paragraph 2.3.
135. Notwithstanding that the Committee's view on this matter does not affect the ultimate result in relation to ground two, the Committee believes that the fact of the three referrals in the ten months prior to Ms Thomson's appointment meant that the primary motivation by Ms Thomson and Mr M for their association was the carrying on by each of them of their respective businesses. To the extent that their business interests were symbiotic, Ms Thomson and Mr M were properly characterised as business associates at the time of Ms Thomson's appointment.
136. The Committee does not foreclose the possibility that a different view could be taken of the relationship between Ms Thomson and Mr M. However, even if the Committee's characterisation of their association as at 29 October 2013 is not accepted, noting that the descriptions of relationships giving rise to conflicts of interest in Paragraph 2.3 are examples only, the Committee considers that the nature of the connection between Ms Thomson and Mr M (ie. a referral relationship) needs to be viewed in light of the way it developed after 29 October 2013.
137. The Committee notes in this regard that, as set out above at paragraph 63, it has found that the relationship did not cease or modify upon Ms Thomson's appointment as Mr M's trustee in bankruptcy. Instead, their professional association extended throughout almost the entirety of his bankruptcy, until 28 October 2016, when they communicated via email about the estate of Mr B.<sup>95</sup>
138. Taken together with the fact that Ms Thomson and Mr M had lunch together on at least two occasions during the period of Mr M's bankruptcy, the Committee is of the view that, on the basis of the Material, which shows the referral relationship between Ms Thomson and Mr M was maintained for three years and ten months, the connection was not a series of *ad hoc* encounters between "mere professional acquaintances", but an ongoing business association.
139. Finally, the Committee notes that, at paragraph 4.11 of her Response, Ms Thomson submitted that she "did not consider at the time, but now accepted, having taken advice, that her decision to attend two lunches with Mr M, who was an undischarged bankrupt under her control at the time could give rise to a belief that she was not acting independently, or otherwise a perception of conflict."<sup>96</sup>

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<sup>94</sup> Cf DP Rayment's discussion of the term "relationship" in ss 60(2) and s 506A of the *Corporations Act 2001* (Cth) in *Joubert v Members of Companies Auditors and Liquidators Disciplinary Board* [2018] AATA 944, [38]-[43]

<sup>95</sup> *Materials* (pp 220-1)

<sup>96</sup> *Materials* (p 687)

*Committee's conclusions*

140. The Committee has found that, according to the material before it, the statements by Ms Thomson during the Interview, and the submissions on her behalf, she did not reflect in detail on her position during the period of the bankruptcy of Mr M in response to the communication from Mr Y dated 29 November 2013 raising concerns about her independence. However, the Committee considers that, in the circumstances, Ms Thomson ought to have recognised that this communication raised an issue regarding a conflict of interest, and taken steps to address this situation in accordance with Paragraph 2.3.
141. In relation to the communication from Mr R on 4 March 2015, the Committee has found that Ms Thomson's responses during the Interview regarding the fact that she addressed the concerns in Mr R's letter personally (including by arranging a meeting with him to provide him with – among other things – information about the Bali Villa Right) indicated that she apprehended upon receiving his letter that a concern had been raised by Mr R about her independence. However, she ought to have, as soon as practicable, taken steps to comply with sub-paragraphs (a) and (b) of Paragraph 2.3, and this did not occur.
142. Notwithstanding that Ms Thomson formed the view that the meeting addressed Mr R's concerns adequately, the Committee finds that she recorded neither the fact that she had made this assessment, the reasons for this assessment, nor the steps she had taken to address the allegation of the conflict (for example, a file note of the meeting with Mr R, or a letter to him summarising the meeting and the information provided to him).
143. The Committee also notes that, in Ms Thomson's description of the meeting that she arranged with Mr R, no reference was made to providing him with details of "any engagement within the last three years where (Mr M) or a company in any way associated with him has been either a creditor, a debtor or an advisor of any entity related to (her) engagement", as he had requested. Instead, the meeting, as recalled by Ms Thomson, concerned the administration itself.<sup>97</sup>
144. Accordingly, the Committee has found that Ms Thomson took no steps to inform the general body of creditors, or any of the persons referred to in sub-paragraph (a) of Paragraph 2.3, of the conflict (as alleged in the communication referred to above at paragraph 50.2). Further, while she described taking some steps which she believed were sufficient to resolve the conflict of interest (as alleged in the communication referred to above at paragraph 50.2), these steps were not sufficient to avoid the conflict, as required by sub-paragraph (b) of Paragraph 2.3, because, first, they were not documented and second, on Ms Thomson's description, they did not adequately address the issue of independence by disclosing the fact that, as at 4 March 2015, Ms Thomson had not only accepted three referrals from Mr M (in connection with the Company) within the preceding three year period, but had communicated with him, in January 2014, about a further referral (Mr B).

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<sup>97</sup> Interview, paragraphs 226-268 (pp 27-9)

145. The Committee believes that it is important for trustees in bankruptcy to understand that the obligation to identify and respond appropriately to actual or potential conflicts of interest during an administration is a continuing one, and it is engaged by an allegation which discloses a perception that the trustee is not independent or impartial.
146. The Committee also considers that compliance with Paragraph 2.3, as it then was, required trustees to notify the persons listed in sub-paragraph (a) of allegations of conflict of interest which disclosed a perception that the trustee was not independent, and to take appropriate steps to avoid the conflict. In the circumstances, the most appropriate way to avoid this conflict would have been to provide Mr R with all the information that he had sought, prepare a proper record of this disclosure, and obtain independent advice (for example, from a lawyer, professional body, or AFSA Regulation) on any other necessary steps.
147. As Ms Thomson did not comply with sub-paragraph (a) or (b) of Paragraph 2.3 in respect of either of the communications received by her during the period of Mr M's bankruptcy, the Committee finds that this ground is made out.

#### **Decision of the Committee**

148. Under s 40-55 of the Schedule, the Committee must decide one or more of the options listed in ss 40-55(1). In making this decision, the Committee may have regard, relevantly, to:
- 148.1. any information provided by the Inspector-General;
  - 148.2. any explanation given by Ms Thomson to the Committee; and
  - 148.3. any other matter that the committee considers relevant.
149. In addition to considering the Materials before the Committee, and the submissions made on Ms Thomson's behalf, set out above at paragraphs 28 and 32, the Committee acted consistently with the process adopted by the 2018 Committee in providing a draft of its decision to Ms Thomson's legal representatives as outlined above at paragraphs 25-27.

#### **Relevant principles**

150. The Committee has also taken into account the following, relevant, principles, as applied to the decision under s 40-55 of the Schedule in relation to Ms Thomson:
- 150.1. The powers to cancel or suspend registration of a trustee are not punitive. The function of the Committee is not to punish or exact retribution. It is entirely protective in the public interest;<sup>98</sup>
  - 150.2. The protection of the public includes deterrence;<sup>99</sup>

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<sup>98</sup> *Re Inspector-General in Bankruptcy v Matthews* [1990] FCA 519, [18] (Von Doussa J)

<sup>99</sup> *NHPT v Members of the Companies Auditors & Liquidators Disciplinary Board* [2015] AATA 245 [18] (DP Tamberlin QC)

- 150.3. It also includes the maintenance of a system under which the public can be confident that trustees will know that breaches of duty will be appropriately dealt with and that the regulatory regime applicable to trustees is effective in maintaining high standards of professional conduct;<sup>100</sup>
- 150.4. The impact of the Committee's decision on the practitioner is to be given limited consideration, as the prime concern of the Committee is the protection of the public;<sup>101</sup>
- 150.5. Relevant matters include the practitioner's recognition and acceptance of the breaches of duty, attitude to compliance generally and willingness to improve. Genuine acceptance of failure, contrition and remorse are necessary requirements to rehabilitation;<sup>102</sup>
- 150.6. A trustee in bankruptcy is a person who must command and retain the confidence of the Court, of the creditors and debtors in bankruptcy proceedings and of the general community. Their competence must be, and remain, of a high order;<sup>103</sup> and
- 150.7. It is accepted that a trustee under the Act has an onerous duty. At times the estate will not have sufficient funds to provide an adequate remuneration.<sup>104</sup>
151. The Committee has also taken into account the various options available to manage any ongoing risk identified as a result of its consideration of the materials before it, in particular, the option that a condition should be imposed on Ms Thomson under ss 40-55(1)(f) and ss 40-55(2) of the Schedule.
152. The Committee also notes, at the outset, that its findings on ground one, namely, that Ms Thomson failed to carry out adequately and properly the duties of a trustee, including, the duty to avoid conflicts of interest, should not be interpreted as a finding that Ms Thomson's conduct was intentionally dishonest or unethical.
153. In the Committee's view, these forms of behaviour are not necessary features of a conflict of interest situation. Rather, a conflict of interest, in the context of the relationship between Ms Thomson and Mr M, arose by virtue of Ms Thomson's status in relation to Mr M, and the linkages and connections between them both prior to and during the period of Mr M's bankruptcy.
154. To summarise, the material before the Committee does not disclose any instances of intentional dishonest behaviour by Ms Thomson. Instead, it is Ms Thomson's

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<sup>100</sup> *NHPT v Members of the Companies Auditors & Liquidators Disciplinary Board* [2015] AATA 245 [18] (DP Tamberlin QC)

<sup>101</sup> *NHPT v Members of the Companies Auditors & Liquidators Disciplinary Board* [2015] AATA 245 [18] (DP Tamberlin QC)

<sup>102</sup> *NHPT v Members of the Companies Auditors & Liquidators Disciplinary Board* [2015] AATA 245 [18] (DP Tamberlin QC)

<sup>103</sup> *Muir v Bradley* (1984) 57 ALR 155

<sup>104</sup> *Wong v Inspector-General in Bankruptcy* [2008] AATA 487 [12] (SM Pascoe)

capacity to identify, reflect on, and avoid a conflict of interest situation that the Committee is concerned with. As noted above at paragraph 68, the Committee is of the view that it should have been apparent to a practitioner of Ms Thomson's experience, given the centrality of this principle to the office of trustee, that there was a risk of a conflict of interest arising if she accepted the appointment as trustee of Mr M's bankrupt estate, and that their referral relationship should not continue once she was so appointed.

155. The Committee members are respectful of Ms Thomson's range and depth of experience as a registered trustee. However, in the view of the Committee the conduct the subject of the first and second grounds falls well short of the standards expected of a practitioner of Ms Thomson's experience.

*Submissions*

156. Submissions received on behalf of Ms Thomson by the Committee may be summarised as follows:
- 156.1. There has been a delay since the events giving rise to the SCN and the interview by the committee, and these events are historical in nature;
  - 156.2. The conduct in the SCN was not continuing in nature and there is no evidence of a systemic problem in Ms Thomson's practice;
  - 156.3. She has since employed a compliance manager, arranged to attend seminars, and put in place practice management software;
  - 156.4. The entirety of the conduct that gives rises to concern on the part of the Inspector-General stems ultimately from or arises in connection with the bankruptcy of Mr M. That reinforces the fact that the conduct has only occurred in a narrow aspect of Ms Thomson's professional work as a registered bankruptcy trustee;
  - 156.5. There was no dishonesty on Ms Thomson's behalf and there was no bad faith;
  - 156.6. There was no actual conflict between Ms Thomson's duties as a trustee and her personal interest and / or her other duties. In saying that, Ms Thomson now recognises that the possibility that a reasonable bystander may possibly perceive there to be a conflict in carrying out her duties as a trustee is a matter to which she must always have regard; and
  - 156.7. She was conducting the administration of the bankrupt estate without funds and without any offer of funds.
157. Ms Thomson has also submitted that:
- 157.1. It is her intention to wind down her current practice and not to accept future appointments as a bankruptcy trustee;<sup>105</sup> and

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<sup>105</sup> 10 March Submissions, paragraph 22.



157.2. She is willing to accept a condition that she not accept any new appointments as a trustee in bankruptcy.<sup>106</sup>

158. The Committee has carefully considered each of these submissions and formed the following views:

158.1. The Committee acknowledges that there has been a period of time (3-6 years, approximately) between the events giving rise to this disciplinary process, raising some challenges for Ms Thomson in responding to the matters in the SCN, however, the lapse of time is not so great that Ms Thomson has been unable to respond to the process by retrieving relevant materials and providing instructions to her legal representatives;

158.2. The Committee also acknowledges that the conduct in the SCN revolved around the relationship between Ms Thomson and Mr M;

158.3. While the Committee welcomes Ms Thomson's decision to employ a compliance manager, install practice management software and consider attending seminars on relevant topics,<sup>107</sup> the Committee is of the view that these tools can only go so far in addressing future conflicts of interest in a busy practice. The Committee considers that trustees are expected to have the requisite understanding of the general law duty to avoid conflicts of interest, and be familiar with the various forms of conflict that can arise, so as to be able to anticipate and identify these scenarios and take appropriate action through the exercise of good judgment, rather than being reliant on advisers and practice management tools to trigger these decisions;

158.4. The Committee agrees that the particular conduct set out in the SCN could be described as occurring in a narrow aspect of Ms Thomson's professional work as a registered trustee. However, while the factual matters giving rise to the findings in ground one may be confined in this way, the Committee is of the view that the duty to avoid conflicts of interest is so fundamental to the role of a bankruptcy trustee, it assumes broader significance from the perspective of managing future regulatory risk;

158.5. While the Committee recognises that the material before it does not disclose intentionally dishonest behaviour or bad faith on Ms Thomson's behalf, the Committee considers that both a potential and actual conflict of interest existed, and the submission made on Ms Thomson's behalf that these features were absent on the facts as found reflects a lack of appreciation of the seriousness of this situation;

158.6. As set out at paragraphs 53 and 54 above, the Committee has found that, as at 29 October 2013, there was potential for Ms Thomson's duties as trustee of Mr M's bankrupt estate to come into conflict (or be seen to do so) with her

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<sup>106</sup> 10 March Submissions, paragraph 24.

<sup>107</sup> No evidence of actual attendance at CPD sessions on relevant areas was provided to the Committee. Similarly, the Committee was not provided with an explanation of how the software referred to in Ms Thomson's submissions works.

personal interests as an insolvency practitioner who had received referrals from Mr M if she accepted the appointment.

158.7. Further, as set out at paragraphs 67 and 69 above, the Committee has concluded that, having accepted the appointment as Mr M's trustee in bankruptcy, and then proceeded to communicate with Mr M about a "new matter" on 13 January 2014, Ms Thomson was in a position of actual conflict of interest from this point onwards; and

158.8. While the Committee appreciates that Ms Thomson was conducting the administration of Mr M's bankrupt estate without funds, it considers that the appropriate course would have been to document the investigations that had taken place, and – where relevant – to document the reasons why no further investigations were undertaken. Otherwise, it is not apparent to a reasonable bystander that the trustee has considered all relevant matters, and may contribute to a perception that a conflict of interest exists.

159. To date, the Committee has not been satisfied that Ms Thomson has herself articulated a sufficiently high level of insight into the nature of the conflict of interest that existed and the scope of the general law duty. The Committee also takes into account the fact that Ms Thomson did not appear to entertain the possibility that a conflict of interest may have arisen until this disciplinary process was instituted.
160. Further, the Committee remains concerned that the submissions made on Ms Thomson's behalf appear to conflate the concept of intentionally dishonest conduct with the existence of an actual conflict of interest. In the Committee's view, to point to the absence of bad faith or criminal behaviour demonstrates a misunderstanding of the scope of the duty to avoid conflicts of interest.
161. On this basis, the Committee has concerns about whether the continuation of Ms Thomson's registration would adequately protect the public. The Committee has given extensive consideration to the forms of conditions that might address these concerns by managing the risk that a conflict of interest may arise again and go undetected by Ms Thomson. In particular, the Committee has considered whether a period of suspension would be appropriate, or whether conditions of the type contained in Ms Thomson's submissions would be adequate. However, the Committee considers that neither of these options are appropriate for managing future risk arising from a similar omission by Ms Thomson.
162. While close supervision of Ms Thomson's files by a senior practitioner would provide the Committee with some reassurance, it is considered that this option is not practicable, given the cost involved. Similarly, suspension would not necessarily address the issues regarding Ms Thomson's failure to demonstrate an appreciation of the full scope of the no conflict duty, and all of her current administrations would need to be managed by another practitioner for the duration of her suspension.

***Submissions by Ms Thomson in relation to the Draft Decision***

163. In the 8 July Submissions, Ms Thomson made further submissions about the appropriate sanction to be considered by Committee.<sup>108</sup>
164. First, she submitted that litigation is ongoing in one of the administrations she is currently conducting, and a transfer of that estate to a new trustee would “inevitably cause substantial disruption and undue expense.” Reference was also made to the annual estate returns due to be completed by 4 August 2020,<sup>109</sup> however, no particular complaint was made by Ms Thomson about this.
165. In the Committee’s view, these submissions fail to particularise the disruption and expense that would follow from the transfer of a particular estate in the context of ongoing litigation, particularly in circumstances where the same legal representatives remain on the record. The Committee also considers that the obligation under s 70-5 of the Schedule in respect of the annual administration return will apply to Ms Thomson with regard to the financial year ending 30 June 2020 regardless of its decision.
166. It was also submitted, at paragraph 6 of the 8 July Submissions, that three registered trustees had separately indicated their interest and in principle consent to be appointed as replacement trustee in respect of the estates that will not shortly be finalised.<sup>110</sup> However, the Committee, having regard to the principles referred to above at paragraph 150, does not consider that this proposal sufficiently mitigates the risks in relation to the administration of those estates that would remain under the control of Ms Thomson.
167. The 8 July Submissions also disputed the finding that Ms Thomson has not displayed an appropriate level of insight into the nature of the conflict of interest that existed. The Committee agrees that Ms Thomson expressed regret for her actions during the Interview, and stated that she understands she should have refused to consent to act as trustee in the estates of Mr M and Mr B. However, the Committee notes that Ms Thomson does not accept that an actual conflict of interest existed<sup>111</sup>, which is relevant to her understanding of the scope of the no conflict duty and her understanding of the gravity of the conflict that existed.
168. The 8 July Submissions also refer to the “improvements to”... “Ms Thomson’s personal knowledge including of the applicable framework for identifying and responding to conflicts of interest and duty / conflicts of duty and duty...”<sup>112</sup> However, the Committee notes that, with regard to the scope of the no conflict rule, the identification of a conflict of interest (as opposed to recognising a conflict retrospectively), and further education and training to address these gaps in her

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<sup>108</sup> 8 July Submissions, paragraphs 25-27

<sup>109</sup> 8 July Submissions, paragraph 5.

<sup>110</sup> 8 July Submissions, paragraph 6

<sup>111</sup> Interview, paragraph 50 (p 13)

<sup>112</sup> 8 July Submissions, paragraph 20

knowledge, no detail was provided by Ms Thomson regarding these matters to the Committee during her Interview<sup>113</sup> or via submissions.

169. For clarification, the Committee confirms that its decision is not based on any finding of intentionally dishonest behaviour or criminality on the part of Ms Thomson. No such conduct was alleged in the SCN and no such conduct has been found to have occurred by the Committee. The Committee has also taken into account Ms Thomson's genuine expressions of regret and remorse, both at the Interview and through submissions made on her behalf. As noted above at paragraph 150.5, these are relevant matters to be taken into account by the Committee in relation to rehabilitation.
170. The Committee has considered the impact of its decision on Ms Thomson. However, as noted above at paragraphs 161 and 162 the Committee is concerned by the lack of any practicable options for close supervision or joint appointments in Ms Thomson's practice. Therefore, while the impact of the Committee's decision on the practitioner is to be given limited consideration, as the primary concern of the Committee is the protection of the public, the Committee has nonetheless taken this into account, and made clear for the purposes of the publication of this decision that its findings do not include any intentional dishonesty or criminality on the part of Ms Thomson.
171. Finally, Ms Thomson submits by the 8 July Submissions that cancellation would be disproportionate<sup>114</sup>, and refers to a number of published decisions by Courts, Tribunals and disciplinary bodies. The Committee has had regard to these reports and decisions. Another principle referred to in the 8 July Submissions is parity. The Committee is hesitant to consider applying the principle of parity to a disciplinary process (which is not a criminal proceeding) in which the key objective is protection of the public.<sup>115</sup>
172. The Committee accepts, however, that its decision must be proportionate to the conduct as found. In this regard, the Committee has taken into account the fact that Ms Thomson's failure to recognise the existence of a potential conflict of interest at the time of providing her consent to act as Mr M's trustee, coupled with her failure to appreciate that her continued occupation of this role constituted an ongoing and actual conflict of interest, indicates a grave misunderstanding of one of the most fundamental duties of trustees under the general law.
173. In summary, the Committee has found that Ms Thomson failed to carry out adequately and properly her general law duty of independence and various statutory duties that she was required to carry out, in circumstances where these failures could have adversely affected the interests of creditors. She also failed to comply with a standard prescribed under the relevant regulations at the time concerning conflicts of interest.

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<sup>113</sup> Interview, paragraphs 82 (p 19), 290 (p 30) & 537 (p 49)

<sup>114</sup> 8 July Submissions, paragraph 34

<sup>115</sup> See, for example, *ASIC v Dunner* [2013 FCA 872, [232]



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Dipen Mitra

Delegate of the  
Inspector-General (Chair)

Date: 30 July 2020

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Mary Wyburn

Attorney-General's appointee

Date: 30 July 2020

.....

Jason Porter

Registered Trustee  
chosen by ARITA

Date: 30 July 2020

For Publication

## ANNEXURE A

### List of cases referred to by the Committee dated 14 February 2020

<i>Re Humphreys v Walter</i> (1931) 3 ABC 254
<i>Re Brian Muir (Registrar in Bankruptcy) v David Bradley</i> [1984] FCA 177
<i>Re Inspector-General in Bankruptcy v Matthews</i> [1990] FCA 519
<i>Wong v Inspector-General in Bankruptcy</i> [2008] AATA 487
<i>Albarran v Companies Auditors &amp; Liquidators Disciplinary Board</i> (2007) 231 CLR 350
<i>NHPT v Members of the Companies Auditors &amp; Liquidators Disciplinary Board</i> [2015] AATA 245
<i>Re Partridge</i> [1982] FCA 316
<i>Re Lamb; Ex parte Registrar in Bankruptcy</i> (1984) 1 FCR 391
<i>Commonwealth v Irving</i> (1996) 65 FCR 291
<i>Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board</i> [2006] FCA 1438
<i>ASIC v Franklin (Liquidator), re: Walton Constructions Pty Ltd</i> (2014) 233 FCR 204
<i>Joubert v Members of Companies Auditors &amp; Liquidators Disciplinary Board</i> [2018] AATA 944
<i>Application by Solomons</i> [2013] FCA 1273
<i>Quin, in the matter of Rowe (Bankrupt)</i> [2016] FCA 823
<i>Deputy Commissioner of Taxation v Niemann</i> (1982) 69 FLR 79
<i>Re: Peter Challen (a bankrupt); ex parte Andrew Brown; Graham Bendeich</i> , unreported, (Beaumont J) 23 April 1996
<i>Starkey v Rondo Building Services Pty Ltd</i> [2005] FCA 1081
<i>Boral Montoro Pty Ltd v McLachlan</i> [2007] FMCA 533
<i>BC39 Pty Ltd v Rambaldi, in the matter of Wharington (Bankrupt)</i> [2014] FCA 1076